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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk

No. 174.

NICHOLAS V. HALTER AND HARRY V. HAYWARD,
Plaintiffs in Error,

v.

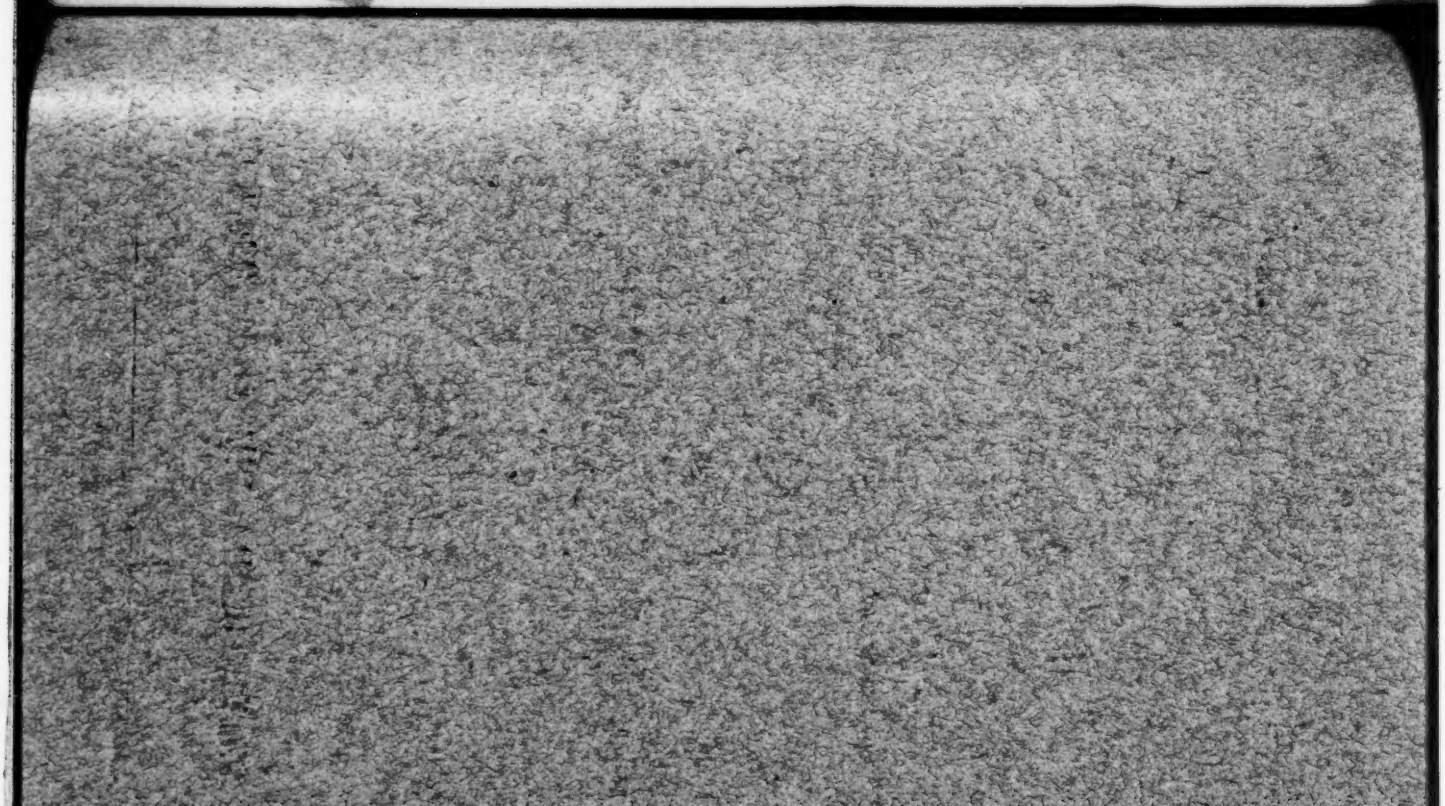
THE STATE OF NEBRASKA.

ERROR FROM THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF THE STATE.

NORRIS BROWN, ATTORNEY GENERAL,
For the State.

STATE JOURNAL CO., LAW BOOK MANUFACTURERS AND 17TH STS., LINCOLN, NEB.



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POINTS AND AUTHORITIES.

I.

Under the police power of the state the legislature may enact laws to punish persons who desecrate the national emblem or use it for advertising a private business.

Updegraph v. Commonwealth, 11 Serg. & Rawl. [Pa.] 406.

Vidal v. Girard, 2 How. [U. S.] 198.

II.

No act of congress or provision of the state or federal constitutions prohibits the legislature of Nebraska from enacting a law to prevent the desecration or misuse of the flag of the United States, and the state is left free to enact such a law.

Fox v. State, 5 How. [U. S.] 410.

III.

The flag law is not unconstitutional as destroying existing property rights.

Patterson v. Kentucky, 97 U. S. 507.
Mugler v. Kansas, 123 U. S. 623.

IV.

The flag law is not unconstitutioual as class legislation.

Mugler v. Kansas, 123 U. S. 660.

V.

The Illinois and New York cases cited in support of the objection to the flag law of Nebraska are not precedents to be followed.

Vidal v. Girard, 2 How. [U. S.] 198.
Ex parte Siebold, 100 U. S. 389.
Fox v. State, 5 How. [U. S.] 410.
Patterson v. Kentucky, 97 U. S. 507.
Mugler v. Kansas, 123 U. S. 623.
Davis v. State, 51 Neb. 302.
Rosenbloom v. State, 64 Neb. 344.

STATEMENT.

Plaintiffs in error were convicted in the district court of Douglas county, Nebraska, of having desecrated the flag of the United States, and each was sentenced to pay a fine of $100 and costs. They committed the offense by exposing to view, advertising and selling beer in a bottle upon which the American flag had been emblazoned. An appeal was taken to the supreme court of Nebraska where the judgment of the district court was affirmed. (See opinion of supreme court of Nebraska, pp. 21-26 of the printed record.) The case is now in this court on a writ of error.

The statute of Nebraska forbidding such a desecration of the national emblem is as follows:

"Any person who in any manner, for exhibition or display, shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance, on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for not more than thirty days, or both,

in the discretion of the court." (Criminal Code, sec. 245e[9].)

There is no dispute about the facts. Plaintiffs in error admit they violated the statute quoted by keeping, advertising and selling beer in a bottle bearing a representation of the flag of the United States, but insist the statute is void.

I.

Under the police power of the state the legislature may enact laws to punish persons who desecrate the national emblem or use it for advertising a private business.

The statute of Nebraska denouncing the desecration of the flag and forbidding its use by individuals for advertising purposes is within the police power of the state. Patriotic sentiment for the stars and stripes is as legitimate a subject of legislation as property rights. The legislature may not only enact laws to protect life, person and property from trespass, but may impose penalties upon those who do not observe a decent respect for the patriotic, moral, and religious sentiments and feelings of others. The religious liberty guaranteed by the constitution does not give the atheist or pagan an unbridled license to go among Christians and blaspheme their Deity. The personal liberty vouchsafed to the people does not permit a man to make an indecent exposure of his person, to use obscene language in the hearing of others, or to provoke an assault or breach of the peace. Police power extends to these subjects, because the state demands from every man a decent respect for the moral and religious feelings and sentiments of others. Patriotic sentiment for the flag and for the noble institutions it symbolizes is outraged by the appearance of the national emblem on a bottle of beer. The sentiments and beliefs of the soldiers who kept the

stars and stripes above all the bloody fields of the Republic ought to be protected by the state from insult and outrage, and the feelings of all patriotic citizens who love their country should be made the subject of police legislation.

It was never the intention of any constitutional provision enacted for the protection of liberty or vested rights to give to any man the monopoly of using the stars and stripes on a brand of beer. The flag was never intended for any such purpose, and every argument and opinion to the contrary is on the side of a pernicious doctrine which has no foundation in justice or reason.

Even if patriotic sentiment, beliefs and feelings for the flag were not entitled to police protection, the police power of the state, on another ground, could be asserted to prevent a desecration or misuse of the national emblem.

An offense against society does not consist merely in an actual breach of the peace, but may include whatever tends to provoke or incite persons to commit a breach of the peace. To desecrate the flag by using it for the purpose of advertising a business which has to be licensed and kept under the surveillance of the police, is to provoke an assault against the offender, and to incite indignant citizens to commit a breach of the peace. Can a soldier who fought for the flag and followed it for years, wherever it floated above the carnage of war, pass a beer sign emblazoned with the stars and stripes without an impulse to smash the sign? Is there no power in the state he saved to protect him from such an insult? Desecration and misuse of the flag are quickly resented. Occurrences are frequently reported in the daily press where violent hands are laid on persons who offer indignities to the flag in public places. In times of peace the patriotic sentiment of loyal citizens is that the flag shall be kept sacred as a national emblem and free from misuse or insult. In times of war the sentiment

is, "If any man attempts to haul down the American flag, shoot him on the spot." An insult to or misuse of the flag is a menace to the peace of society. It tends to provoke an assault and incites men to violence. Under the police power of the state, therefore, the legislature may enact statutes to prevent desecration or misuse of the flag. For private individuals to make use of the stars and stripes to advertise their goods, is a misuse of the national emblem. To make it a part of a trade-mark for a brand of beer is an affront to every patriotic citizen.

The statute assailed in this case grew out of patriotism and the love of good government. It is a law demanded by soldiers and other patriotic citizens whose sensibilities have been shocked by misuse of the flag.

The principles invoked by the state of Nebraska in this case are enforced every day in the police courts of the country. Offenders are being continually fined for not observing a decent respect for the sensibilties and sentiments of others. Convictions for licentious or profane conversations, for using language calculated to provoke an assault, and for other offenses which injure the feelings of others are frequent occurrences in the cities of the country. These punishments are inflicted because the police power is interposed to enforce a proper respect for the beliefs, sentiments, and moral and religious convictions of the people.

The right of the state to interpose its police power in such cases is sanctioned by text-writers, by the state courts, and by the supreme court of the United States. Without the enforcement of such laws, liberty and vested rights would avail but little.

In *Updegraph v. Commonwealth*, 11 Serg. & Rawl. [Pa.], 406, the supreme court of Pennsylvania said:

"An offense against the public peace may consist either of an actual breach of the peace, *or doing that which tends to provoke and excite others to do it. Within the latter description fall all acts and all attempts to produce disorder, by written, printed, or oral communications, for the purpose of generally weakening those religious and moral restraints, without the aid of which mere legislative provisions would prove ineffectual.*"

The doctrine of the supreme court of Pennsylvania in *Updegraph v. Commonwealth*, has been sanctioned by Mr. Justice STORY in *Vidal v. Girard*, 2 How. [U. S.] 198, wherein that eminent jurist said:

"We are compelled to admit that although Christianity be no part of the common law of this state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, *to the annoyance of believers or the injury of the public.*"

Tiedeman, in his work on Limitations of Police Power, says (p. 168):

"Blasphemy is punishable, because, as already stated, it *works an annoyance to the believer* and an injury to the public."

It is unnecessary to cite cases in support of the doctrine that feelings, beliefs and sentiments founded on morality, religion and the demands of good government, may be protected by the police power of the state. Injury to these attributes of human nature often inflicts greater pain and suffering and causes greater disturbances than any possible invasion of property rights.

When the colonies separated from England, they professed a decent respect for the opinions of mankind. The first sentence in the Declaration of Independence contains these words:

"*A decent respect to the opinions of mankind* requires

that they should declare the causes which impel them to a separation."

Liberty must have gone to seed if there is now no power in the state to enforce a decent respect for the opinions of those patriotic citizens who believe that a beer sign is not a proper place to emblazon the stars and stripes.

The purpose of the act is to enforce a proper respect for the feelings of others, to promote patriotism, morality, order, and the general welfare, and to prevent disturbances of the peace, by making provision for the punishment of those who desecrate or misuse the flag.

II.

No act of congress or provision of the state or federal constitutions prohibits the legislature of Nebraska from enacting a law to prevent the desecration or misuse of the flag of the United States, and the state is left free to enact such a law.

Plaintiffs in error argue that the statute of Nebraska forbidding the desecration or misuse of the flag is void because the flag is solely a creation of federal law, and for that reason they insist a state has no right to prescribe the use that may be made of it by the people of the United States.

An examination of the argument on this point will show that it affords no ground for striking down the statute of Nebraska. There is no limitation upon the police power of this state except that imposed by the state and federal constitutions or by acts of congress exclusively within federal jurisdiction. The lawmakers are hampered by no limitations except those imposed by the supreme law or acts of congress. The rule has been stated by the supreme court of Nebraska as follows:

"State constitutions are not grants of authority, but limitations of power. *State legislatures can exercise such powers as are not inhibited by the fundamental law.*" (*Scott v. Flowers*, 60 Neb. 685.)

No provision of the state or federal constitutions nor any act of congress prohibits the legislature of Nebraska, in the exercise of police power, from enacting a law to prevent the desecration or misuse of the flag of the United States. The state legislature, therefore, in the interests of the public welfare, may enact such a law; nor can it be argued that the spirit of the constitution puts a limit on legislative action. In the state of Nebraska, as elsewhere, the spirit of the fundamental law can no longer be invoked to strike down an act of the legislature. (*Redell v. Moores*, 63 Neb. 219, overruling *State v. Moores*, 55 Neb. 480.)

The constitution of the United States does not provide for any law regulating the use of the flag. But on February 20, 1905 (which was subsequent to the trial and conviction of plaintiffs in error), congress recognized and asserted the right to enact a law providing that any trademark which "consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any state or municipality, or of any foreign nation," shall be refused registration. (Supp. U. S. Compiled Statutes, 1905, sec. 5, ch. 2, p. 670.)

The flag of the United States is also the flag of the state, in the state's connection with the nation. There are many subjects of police regulation upon which both the state and the nation may legislate, and the acts of both may be enforced where they do not conflict. The rule is that wherever they are repugnant, the acts of congress prevail. Having possession of counterfeit coin in a state may be punishable as well under state as under

federal laws. (*State v. Washburn*, 11 Iowa, 245; *Fox v. State*, 5 How. [U. S.] 410.) Offenders against naturalization laws passed by congress may be punished by both state and federal enactments. (*Ex parte Siebold*, 100 U. S. 391.) An offender against a federal statute establishing weights and measures may be amenable to both the state and the nation. (*Ex parte Siebold*, 100 U. S. 391.) Election officers, for unlawful conduct at elections for congressmen, may be punished by state and federal authority. (*Ex parte Siebold*, 100 U. S. 391.) It has been adjudicated by the supreme court of the United States that the police power of the state and nation may be concurrently exercised.

In *Moore v. State*, 14 How. [U. S.] 19, the supreme court of the United States said:

"Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both."

It is no answer to this argument to say that a person may thus be twice punished for the same offense. In discussing this question the supreme court of the United States, in *Ex parte Siebold*, 100 U. S. 389, said:

"Another objection made is, that, if congress can impose penalties for violation of state laws, the officer will be made liable to double punishment for delinquency,—at the suit of the state, and at the suit of the United States; but the answer to this is, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act need not now be decided; although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained."

The cases cited from the supreme court of the United States show beyond question that the state and national governments, in the exercise of police power, may both make provision by statute for the punishment of offenses, and that this is true, though the subject might be one over which congress could exercise,—but which in this case it has not exercised,—exclusive jurisdiction. The case cited by plaintiffs in error (*Ruhstrat v. People*, 185 Ill. 133), in so far as it states a rule different from that adopted by the supreme court of the United States, should be ignored.

The constitution of the United States grants to congress the power to coin money, to regulate the value thereof, to fix the standard of weights and measures, and to provide for the punishment of counterfeiting securities and current coin of the United States; but these provisions of the federal constitution do not take away from the state the police power to punish those who counterfeit coin or make use of false weights or measures.

The counterfeiting of coin is forbidden by section 145 of the Criminal Code of the state of Nebraska. Other states have enacted and enforced such statutes. Such enactments for the protection of the public and the prevention of crime are strictly within the police power of the state. In speaking of the state's jurisdiction over such offenses, the supreme court of the United States said:

"Such a jurisdiction, if not indispensable, is to the last degree useful and expedient. And it has been exercised almost, if not quite, universally by the different states which compose the Union. The rightfulness of this jurisdiction is now, for the first time, questioned in this court. Certainly it presents a question of the first magnitude, for no one can foresee what may be the consequences of taking from the state the power of self-protection, which they have so long exercised, against a class of criminals swarming over the entire Union, and against a species of crime which, more than any other, affects the common business of the people.

"The argument against the exercise of this jurisdiction by the states proceeds upon the ground that it exclusively belongs to the courts of the United States, and that it arises out of the provisions of the constitution giving to congress the power to coin money, regulate its value and the value of foreign coin, and to punish the counterfeiting of the current coin of the United States; and out of the exercise of these powers by congress in the enactment of laws regulating the coin, and providing punishment for the offense of counterfeiting.

"The question is simply one of criminal jurisdiction over an offense cognizable in every state of the Union, either at the common law or by virtue of state legislation.

"It is clear, in the first place, that this branch of criminal jurisdiction belonged to the states, respectively, before the adoption of the constitution; and that it continues with them, unless it has been wholly surrendered to the federal government. It is also clear, that there is no express prohibition in the constitution to the exercise of this jurisdiction by the states. The exclusion of state jurisdiction is argued from the fact that the constitution vests a jurisdiction over this offense in the United States, by authorizing congress to pass laws for its punishment, which jurisdiction, it is said, must necessarily be exclusive. We deny this inference, and claim that the jurisdiction may be concurrent.

"The mere grant of a power in the constitution has never been held to divest the states of the power so granted. *There must be something more; either a prohibition, a grant in exclusive terms, or a manifest incompatibility.*" (*Fox v. State*, 5 How. [U. S.] 416.)

By the rulings of the highest court of the land, therefore, it is made clear that the legislature of the state of Nebraska, in enacting the statute which prohibits a desecration or misuse of the flag, did not intrude on the exclusive jurisdiction of congress, and the argument of plaintiffs in error to the effect that the flag is solely a creation of federal law, and in consequence the state has no right to prescribe the use that may be made of it by the people, must fail.

III.

The flag law is not unconstitutional as destroying existing property rights.

Plaintiffs in error are engaged in selling beer, and use a trade-mark which they call the "Stars and Stripes." Their trade-mark bears a representation of the flag of the United States, and they argue that the flag law of Nebraska, in providing for their punishment for making such a use of the flag, deprives them of property rights guaranteed by the constitution, and is therefore void.

The argument on this point attaches to their trade-mark a dignity and importance not warranted by the law of the land. Trade-marks are subject to police regulation. Persons who use an improper or offensive trade-mark cannot make it a shield to disturb or annoy the public. A man may not use an obscene or offensive trade-mark and defy the law by pleading liberty and property rights. A crook or confidence man may procure a patent or trade-mark for a lottery wheel, but he cannot prevent the officers of the law from seizing him and his property when he uses the patented article for conducting a lottery. For the same reason, the police power of the state may be interposed to prevent him from using the flag in such a manner as to annoy patriotic citizens, and to incite them to commit a breach of the peace. A trade-mark or patent puts no restraint on police power. In discussing the effect of a patent in connection with statutory regulations of a state the supreme court of the United States said:

"The end of the statute was to encourage useful inventions, and to hold forth, as inducements to the inventor, the exclusive use of his inventions for a limited period. The sole operation of the statute is to enable him to prevent others from using the products of his labors except with his consent. But his own right of using is not en-

larged or affected. There remains in him, as in every other citizen, the power to manage his property, or give direction to his labor at his pleasure, *subject only to the paramount claims of society, which require that his enjoyment may be modified by the exigencies of the community to which he belongs, and regulated by laws which render it subservient to the general welfare, if held subject to state control.*" (*Patterson v. Kentucky*, 97 U. S. 507.)

The patent or trade-mark on a dangerous drug or explosive does not prevent the state from prohibiting the sale of the patented article. (*Patterson v. Kentucky*, 97 U. S. 501.)

In the exercise of police power the state of Nebraska may not only interfere with the trade-mark on the beer sold by plaintiffs in error, but may absolutely prohibit the sale of beer in the state, and thus make their property valueless. (*Mugler v. Kansas*, 123 U. S. 623.)

Prior to prohibition in Kansas, brewers with vast property interests had established breweries in that state. These brewers no doubt had trade-marks and patents in addition to other property rights, and they resisted the prohibitory laws of Kansas to the last extremity, on the ground that those laws deprived them of property rights, of liberty, of equal protection of the laws, and of other rights guaranteed by the state and federal constitutions.

The supreme court of the United States decided all these questions against the brewers, and vindicated the state in its exercise of police power, laying down the following rules:

"The prohibition by the state of Kansas, in its constitution and laws, of the manufacture or sale within the limits of the state of intoxicating liquors for general use there as a beverage, is fairly adapted to the end of protecting the community against the evils which result from excessive use of ardent spirits; and is not subject to the objection,

that, under the guise of police regulations, the state is aiming to deprive the citizen of his constitutional rights.

"Lawful state legislation, in the exercise of the police powers of the state, to prohibit the manufacture and sale within the state of spirituous, malt, vinous, fermented, or other intoxicating liquors, to be used as a beverage, *may be enforced against persons who, at the time, happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments.*" (*Mugler v. Kansas*, 123 U. S. 623.)

According to the highest court of the land, therefore, the right of the state, in the exercise of police power, to interfere with property rights is beyond question. The legislature of the state has such power. When this power should be exercised is a question for the lawmakers, and not for the courts. It is for the legislature to decide when the time has arrived to exercise the police power in any particular direction, or whether desecration and misuse of the flag should be prohibited. In discussing the exercise of police power, the supreme court of the United States has said:

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. *It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.*" (*Mugler v. Kansas*, 123 U. S. 660-661.)

Since the legislature of Nebraska, in enacting the flag

law, has entered a field where its power is legitimate, it is not for the courts to interfere.

Plaintiffs in error, on page 7 of their brief filed in the supreme court of Nebraska, make this statement:

"The flag is an emblem of national sovereignty and the property of the people of the United States, under the laws and constitution of the United States."

If it be true, as stated by plaintiffs in error, that the flag is an emblem of national authority and the property of the people of *the United States*, how can it be possible for individuals to acquire exclusive property rights in the stars and stripes? If the flag is the property of the people, how can plaintiffs in error obtain the exclusive right to use it on their brand of beer? If the flag is the property of the people, what is to prevent the state from enacting laws to protect that property from desecration and misuse? The statute books of this and other states are full of laws enacted to protect the emblem of The Grand Army of the Republic, and of other societies. Why should not the flag, the emblem of the United States, be likewise protected? It is insisted by the state that the legislation on this subject is both valid and proper.

IV.

The flag law is not unconstitutional as class legislation.

Section 3 of the flag law forbidding the desecration or misuse of the flag provides:

"This act shall not apply to any act permitted by the statutes of the United States of America or by the United States Army and Navy Regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of

jewelry, or stationery for use in correspondence, on any of which shall be printed, painted, or placed, said flag, *disconnected from any advertisement.* (Criminal Code, sec. 245*a*[11].)

Plaintiffs in error argue that the foregoing provision is class legislation and that it, for that reason, invalidates the flag law. This argument is based on their assertion that the "law directly permits publishers of newspapers and books, the stationer and the jeweler, to use the flag in their business, to place it upon their goods and wares, and thereby attract attention—advertising—and so increase their trade and business."

Examination of this act will show that publishers, stationers and jewelers are only permitted to use the flag in the manner stated in the law, when the flag so used is "*disconnected from any advertisement.*" The classes named, therefore, are not permitted to use the flag in connection with any advertisement, but are permitted to display it as a national emblem. When not used in connection with any advertisement, the legislature, in the exercise of police power, has said it is a proper use of the flag, when disconnected from an advertisement, to allow it to appear on "a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence." It was competent for the legislature to decide that these were proper uses of the flag, and the privileges are extended to all alike. Such a use of the national emblem annoys no one, and does not incite persons to commit a breach of the peace. The distinction made by the lawmakers is a proper one, and to them alone the police power was committed. (*Mugler v. Kansas*, 123 U. S. 660.)

Even if the purposes of the classification or distinction made by the legislature were correctly stated by plaintiffs

in error, the law would not be unconstitutional. The power to make classifications for the purposes of legislation has been committed to the legislature. In the state of Nebraska the lawmakers recently enacted a statute which provided for the punishment of peddlers who sell goods manufactured by others within the county, while those who sell goods manufactured by themselves were not subject to such punishment. This enactment was sustained by the supreme court of the state as a proper classification and as valid legislation. (*Rosenbloom v. State*, 64 Neb. 344.) While the ruling applied to legislation on the subject of taxation, the rule is the same when applied to a police regulation against peddlers. (*State v. Montgomery*, 43 Atl. [Me.] 13; *Ex parte Thornton*, 12 Fed. 538.) The argument, therefore, that the flag law of Nebraska should be condemned as class legislation is wholly without merit.

The arguments of the plaintiff in error under this head are also untenable on another ground. In the state of Nebraska the legislature has plenary power in defining crimes and in prescribing punishment therefor. (*Davis v. State*, 51 Neb. 302.)

In 12 Cyclopedia of Law and Procedure, p. 136, the doctrine is stated as follows:

"The legislatures of the different states have the inherent power to prohibit and punish any act as a crime, provided they do not violate the restrictions of the state and federal constitutions; and the court cannot look further into the propriety of a penal statute than to ascertain whether the legislature had the power to enact it."

In a note to this paragraph may be found a long line of cases to sustain the principle stated. The very power to define a crime includes the power to classify and to describe the persons and acts that come within the operation

of the penal statute. The classification or distinction made by the legislature, therefore, affords no ground whatever for holding the flag law invalid.

V.

The Illinois and New York cases cited in support of the objection to the flag law of Nebraska are not precedents to be followed.

It is earnestly insisted by the state that the holdings in which enactments to prevent the desecration and misuse of the flag, have been held invalid should not be followed. The writers of the opinions in those cases missed the philosophy of flag legislation. In the Illinois case it will be observed that the chief justice and two other members of the court dissented; and the New York decision adds nothing to what was said in the Illinois case.

In the opinion of the supreme court of Nebraska in the case at bar (pp. 21-26, printed record), these two decisions are reviewed at length, and the court refused to follow them.

The opinions in the Illinois and New York cases contradict elementary principles laid down by this court. An examination of those cases will disclose that they violate the following rules, which are essential to the proper government of society:

1. The state, in the exercise of police power, may demand from every man a decent respect for the moral, religious and patriotic sentiments of others and punish persons who incite others to break the peace. (*Vidal v. Girard*, 2 How. [U. S.] 198.)

2. The police powers of the state and nation may be concurrently exercised to punish the same acts. (*Ex parte Siebold*, 100 U. S. 389; *Fox v. State*, 5 How. [U. S.] 410.)

3. The state, in the exercise of police power, may interfere with trade-marks and property rights. (*Patterson v. Kentucky*, 97 U. S. 507; *Mugler v. Kansas*, 123 U. S. 623.)

4. The state has plenary power to describe and punish offenses, and for that purpose the legislature may make classifications and distinctions. (*Mugler v. Kansas*, 123 U. S. 660; *Davis v. State*, 51 Neb. 302; *Rosenbloom v. State*, 64 Neb. 344.)

The principles stated are violated by the decisions holding the flag law invalid. It is earnestly insisted that the opinion of the supreme court of Nebraska correctly sustains the flag law of Nebraska, and should be affirmed.

Respectfully submitted,

Norris Brown, *Attorney General,*
For the State.